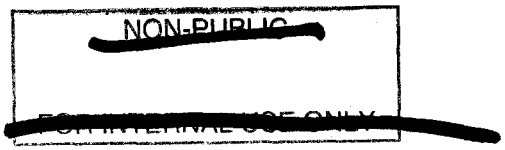
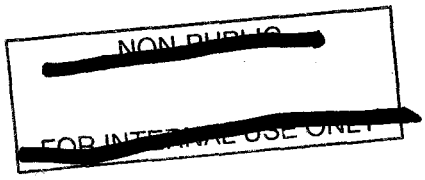


Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	WC Docket No. 11-42
Request for Confidential Treatment of Nexus Communications, Inc. Filing of FCC Form 555	)	

APPLICATION FOR REVIEW



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May 13, 2013

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EXECUTIVE SUMMARY

Nexus Communications, Inc. ("Nexus"), pursuant to Sections 0.459(g) and 1.115 of the rules of the Federal Communications Commission ("Commission"), hereby seeks review of an April 29, 2013, determination by the Wireline Competition Bureau ("WCB") to deny confidential treatment of Nexus' Form 555 filings for data year 2012.[1] In the *Order,* the WCB mistakenly held that Nexus' competitively sensitive state-specific subscriber counts were already effectively publicly available through data on the website of the Universal Service Administrative Company ("USAC"), and, compounding that error, completely ignored the fact that the highly sensitive, detailed data on Form 555 regarding subscriber de-enrollments is not publicly known at all.

Nexus respectfully requests that the Commission reverse the *Order* and rule that its Form 555 filings for data year 2012 must be treated confidentially by the Commission and withheld from public disclosure pursuant to 47 C.F.R. §§ 0.457 and 0.459; to Exemption 4 from the Freedom of Information Act ("FOIA") (5 U.S.C. § 552(b)(4)); and to the Trade Secrets Act, 18 U.S.C. § 1905 ("Trade Secrets Act"). This ruling is appropriate because:

- The *Order* erred in finding that subscriber counts can be determined from data on the USAC website; they cannot.
- The *Order* ignored the confidential status of the Form 555 de-enrollment data and erroneously concluded that Nexus had not adequately shown that it would be harmed in the marketplace by disclosure of such data.
- The *Order* erroneously relied on decisions by other ETCs to reveal their confidential data in denying confidential treatment to Nexus' data; the relevant legal test is what use other entities could make of Nexus' data, not what they did with their own.

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[1] *In re Request for Confidential Treatment of Nexus Communications, Inc. Filing of FCC Form 555,* Order, WC Docket No. 11-42 (rel. April 29, 2013) ("*Order*").

- The *Order* ignores the fact that market participants can combine their on-the-ground knowledge of competitive conditions with data from the Form 555 filings to obtain competitively sensitive information.

The Commission, therefore, should reverse the WCB and protect the confidentiality of Nexus' data.

I. INTRODUCTION

The *Order* found that Nexus had not shown that its competitive position in the market for Lifeline services would likely be harmed by public disclosure of its state-by-state subscriber counts and subscriber de-enrollment information, and so denied Nexus' request for confidential treatment of its Form 555 filings for data year 2012. This conclusion was based on the view that state-by-state subscriber count and de-enrollment information is not confidential. The *Order* found that Nexus' subscriber count information is "essentially" publicly available because USAC posts Lifeline disbursement amounts on its website, from which, according to the *Order*, the public can easily deduce Nexus' subscriber counts. Notably, the *Order* did not find – because it could not – that ***de-enrollment data*** from the Form 555 was publicly available – there is no conceivable source for such information other than the form. With respect to this data, however, the *Order* found that Nexus' showing of potential competitive injury was "vague," and that other eligible telecommunications carriers ("ETCs") have publicly disclosed it without seeking confidential treatment. On this basis, the *Order* denied confidential treatment of de-enrollment data as well.

The *Order* is contrary to governing law and is based on erroneous findings of material fact. As a factual matter, subscriber count information is not available on USAC's website and cannot be accurately determined from the disbursement figures posted there. Specifically, subscriber counts cannot be determined simply by dividing Lifeline disbursement amounts by the flat $9.25 per subscriber Lifeline support level. The $9.25 amount was phased in over time and

only went fully into effect for all ETCs in October 2012, so May 2012 disbursement data cannot be readily translated into subscriber counts. Moreover, disbursement amounts are affected by a variety of factors, including a projection of subscriber counts based on a USAC-proprietary formula that is not publicly available, as well as by other adjustments that USAC might make. In addition, Form 497 filings, on which disbursements are based, are subject to revision on a rolling-12-month deadline, so subscriber counts included in a Form 555 may well reflect more accurate data than the amounts on which the disbursements themselves were made. The *Order* was simply wrong to conclude that there is any sort of one-to-one correspondence between disbursements shown on USAC's website and actual subscriber counts. And, again, the *Order* did not ever purport to find that de-enrollment data was publicly available.

From a legal perspective, Commission precedent requires that Nexus' state subscriber count and de-enrollment figures be protected from public release because it is highly competitively sensitive information. The *Order* contains no substantive reasoning (or any citation to precedent) that would justify its deviation from the Commission's long-standing policy of treating such information confidentially. The *Order* merely stated that Nexus' showing that its competitive position would be compromised by disclosure of this information was "vague" and that other ETCs that compete with Nexus in the market for Lifeline services have disclosed the information. Neither of those rationales justifies denial of Nexus' request.

First, Nexus' request for confidential treatment makes the same showing of likely competitive harm that the Commission has found sufficient to warrant confidential treatment of market-specific subscriber information in similar contexts, such as information about subscriber churn and subscriber service cancellations.

Second, it does not matter what other ETCs may have chosen to do; Nexus is entitled to confidential treatment of its information if its competitors can use that information against Nexus in the marketplace. The *Order* did not dispute that Nexus' competitors could use Nexus' information to competitively disadvantage Nexus; it simply noted that other ETCs choose to release ***their own*** data. The market for Lifeline services is not operated as a cooperative, and Nexus is not responsible for the decisions of other ETCs. In this regard, Nexus is a very different company than its main competitors (such as Virgin Mobile and Tracfone). Those competitors are much larger overall, and provide service to many market segments beyond Lifeline subscribers, which makes Nexus comparatively more vulnerable to disclosure of information about its Lifeline operations. In any event, and as shown in more detail in the attached affidavit,[2] Nexus has shown that the market for Lifeline services is competitive and that that its competitive position may be damaged if the subscriber count and de-enrollment data in its Form 555 filings is publicly disclosed. Nexus' Form 555 filings are, therefore, entitled to confidential treatment under the Commission's regulations and the federal disclosure statutes incorporated therein.

Third, the *Order* should be reversed even if Nexus' data is not itself literally confidential, because knowledgeable industry participants can combine that information with on-the-ground market intelligence to derive highly useful competitive information about the effectiveness of Nexus' marketing, advertising, and customer retention activities. Precedent establishes that competitors are entitled to protection against being forced to enable their rivals to uncover such competitively sensitive material.

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[2] Affidavit of August Ankum, Ph.D. and Olesya Denney, Ph.D. of QSI Consulting, attached hereto as Exhibit A.

Accordingly, Nexus respectfully requests that the Commission: (1) reverse the *Order*; and (2) issue an order determining that Nexus' FCC Form 555 filings for data year 2012 must be treated confidentially by the Commission and withheld from public disclosure pursuant to 47 C.F.R. § 0.457 and 0.459, to FOIA Exemption 4, and to the Trade Secrets Act.

II. BACKGROUND

The *Lifeline Reform Order*[3] requires ETCs to conduct annual re-certification and on-going non-usage reviews to confirm the eligibility of their Lifeline subscribers.[4] Subscribers are de-enrolled if they are no longer eligible or have not used the service for 60 consecutive days.[5] ETCs must report the results of these reviews on an annual basis by filing Form 555 with the Commission on or before January 31 of each year.[6]

On January 31, 2013, Nexus submitted its Form 555 filings for data year 2012. Concurrently, Nexus filed a request for confidential treatment of its Forms 555, on the ground that the information in the filings is extremely commercially sensitive and constitutes trade secrets.[7] Specifically, Nexus sought protection of its state specific subscriber counts and de-enrollment information pursuant to 47 C.F.R. §§ 0.457 and 0.459, to FOIA Exemption 4, and to the Trade Secrets Act, because it constitutes confidential commercial and financial information.[8]

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3 *Lifeline and Link Up Reform and Modernization et al.*, WC Docket No. 11-42 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd. 6656 (FCC rel. Feb. 6, 2012) ("*Lifeline Reform Order*").

4 *Id.* at 6715 ¶ 130; *see also* 47 C.F.R. § 54.410(f).

5 *Lifeline Reform Order*, 27 FCC Rcd. at 6768 ¶ 257; 47 C.F.R. § 54.405(e). De-enrollment for non-usage does not apply to subscribers who make a minimum monthly payment.

6 *Lifeline Reform Order*, 27 FCC Rcd. at 6715-16, 6721-22, 6768, ¶¶ 130-32, 148, 257.

7 Nexus' Request for Confidential Treatment of Nexus' Filing of FCC Form 555, WC Docket 11-42 (filed Jan. 31, 2013) ("*Request for Confidential Treatment*").

8 *Nexus' Request for Confidential Treatment*, WC Docket No. 11-42, at 1-3; Letter from Christopher W. Savage, Counsel to Nexus, to Marlene H. Dortch, Secretary, Federal

On April 29, 2013, the WCB issued the *Order* denying Nexus' request for confidential treatment of its Form 555 filings. Nexus timely filed this Application for Review of the *Order*.[9]

III. STANDARD OF REVIEW

The Commission should grant an application for review if it is shown that the action taken: (1) conflicts with statute, regulation, case precedent, or established Commission policy; (2) involves a question of law or policy which has not previously been resolved by the Commission; (3) involves application of a precedent or policy which should be overturned or revised; (4) reflects an erroneous finding as to an important or material question of fact; or (5) involves prejudicial procedural error. 47 C.F.R. § 1.115(b)(2). As explained below, the decision to deny confidential treatment of Nexus' Form 555 filings is contrary to governing law and is based on erroneous findings of material fact.

IV. ARGUMENT

Pursuant to 47 C.F.R. § 0.457 and 0.459, FOIA Exemption 4, and the Trade Secrets Act, data submitted to the Commission is exempt from public disclosure, and entitled to confidential treatment, if it is: (1) commercial or financial in nature; (2) obtained from a person; and (3) privileged or confidential in nature.[10] The *Order* does not dispute that Nexus' subscriber count

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Communications Commission, WC Docket No. 11-41 (filed Feb. 19, 2013) (*"Nexus Supplement"*). The *Request for Confidential Treatment* and *Nexus Supplement* are referred to collectively herein as Nexus' request for confidential treatment.

[9] 47 C.F.R. § 0.459 (g) ("If a request for confidentiality is denied, the person who submitted the request may, within ten business days, file an application for review by the Commission").

[10] The Commission's regulations governing public disclosure and confidential treatment of information implement and incorporate FOIA Exemption 4 and the Trade Secrets Act. *See* 47 C.F.R. §§ 0.457(c)(5) and (d), 0.459. Under the Trade Secrets Act, federal agencies or employees may not disclose information relating to "the trade secrets, processes, operations, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm partnership, corporation, or association . . . ." 18 U.S.C. § 1905. FOIA Exemption 4 and 18 U.S.C. § 1905 are coextensive, and Section 1905 prohibits

and de-enrollment information is commercial and financial in nature and obtained from a person within the meaning of FOIA Exemption 4. However, the *Order* denied Nexus' request for confidential treatment because Nexus had supposedly failed to show that the information is confidential.[11] Nexus respectfully submits that this conclusion is incorrect.

For purposes of FOIA Exemption 4, information is "confidential" if disclosure is likely "to cause substantial harm to the competitive position of the person from whom the information was obtained."[12] The *Order* claims that Nexus will not suffer a substantial competitive injury from the public disclosure of its Form 555 data because: (1) Nexus' subscriber count information is "essentially already publicly available" on USAC's website; and (2) Nexus has not sufficiently shown that its competitive position in the market for Lifeline services would be harmed by the disclosure of subscriber count and de-enrollment data that other ETC's have disclosed publicly.[13] These claims are both factually and legally erroneous.

A. Nexus' Subscriber Count And De-Enrollment Information Is Not Publicly Available On USAC's Website Or Elsewhere.

In its confidentiality request, Nexus showed that it has treated and continues to treat its subscriber count and de-enrollment information as confidential. Nexus stated that it is "a privately-held entity that does not publicly disclose its subscriber counts, either state wide or in terms of the number of ineligible subscribers, de-enrolled subscribers, or other characteristics of its subscribers in terms of their eligible characteristics."[14] Nexus stated that it "has consistently

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public release of confidential business information unless the disclosure is authorized by a federal statute other than FOIA. *See Chrysler v. Brown*, 441 U.S. 281 (1979).

11 *Order*, WC Docket No. 11-42 at ¶ 6.

12 *Nat'l Parks and Conservation Ass'n v. Morton,* 498 F.2d 765, 770 (D.C. Cir. 1974).

13 *Order*, WC Docket No. 11-42 at ¶ 6.

14 *Request for Confidential Treatment* at 3.

sought to keep the confidential information from being publicly disclosed to the extent permissible under state and federal law."[15]

The *Order* does not dispute these statements. Nonetheless, the *Order* concludes that Nexus' state-by-state subscriber count information is not confidential because the information is "essentially already publicly available."[16] Specifically, the *Order* states that "each ETC's Lifeline disbursement amounts are publicly available at USAC's website on a monthly basis for each study area code, which means the public can easily deduce, with a high level of accuracy, an ETC's lifeline subscriber count based on the amount of public funds it receives."[17] The *Order* concludes that, "[g]iven that the support amounts for voice service are set at a flat rate amount, the public can easily calculate subscriber counts for each ETC based on the amount of disbursements each month for each state."[18]

These conclusions are wrong.

First, while the national $9.25 Lifeline support level was announced in February 2012, ETCs were permitted to phase it in over time, beginning in April 2012 and continuing through October 2012.[19] Different ETCs could choose to phase in the new rate using different, ETC-specific schedules, with no public announcement of such schedules.[20] This consideration alone means that it is simply wrong that dividing May 2012 disbursements by $9.25 will lead to an accurate subscriber count.

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15 *Id.*

16 *Order*, WC Docket No. 11-42 at ¶ 6.

17 *Id.* at ¶ 6.

18 *Id.* at n. 9.

19 *See Wireline Competition Bureau Provides Notice Regarding the Effective Date of Certain Rules Adopted in the Lifeline Reform Order*, Public Notice, WC Docket Nos. 11-42, 03-109, 12-23 and CC Docket No. 96-45 (rel. May 1, 2012).

20 *Lifeline Reform Order* at ¶¶ 302-309.

In addition, USAC's disbursements are affected by the application of a non-public algorithm that USAC used until October 2012 to adjust payments up or down to reflect various factors such as the rate of change of an ETC's subscriber counts.[21] This factor, too, muddies the link between disbursement amounts and subscriber counts.

Moreover, disbursements are based on the Form 497s submitted by ETCs, but ETCs have a year after submission of a Form 497 to make revisions to it. The ETC, however, may or may not have filed a revision to its subscriber counts for data month May 2012 by the time it filed its Form 555 in January 2013. ETCs routinely review their subscriber counts and data to determine whether revisions are necessary, but given that they have up to 12 months to file revisions, each individual ETC may have a different schedule for making final determinations of whether or not, and the extent of, any necessary revisions. This means that the final, most accurate subscriber count may or may not be embodied in the disbursement amounts on USAC's website.

Furthermore, while the reimbursement rate for non-Tribal areas is indeed $9.25 (after the phase-in has occurred), the rate for tribal areas is different, and much higher: a total of $34.25. USAC disbursement data are not broken down between disbursements for Tribal and non-Tribal areas. Therefore, for any states where there are significant Tribal areas, it is simply impossible to derive subscriber counts from disbursement data, because a wide mix of Tribal and non-Tribal subscriber counts could lead to the same overall disbursement amount.[22]

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21 *Id.*

22 These various factual errors in the *Order's* conclusion that one can derive subscriber counts from disbursement data are explained in Exhibit A.

These considerations show that the *Order*'s claim that subscriber count information is "essentially already publicly available" is wrong as a factual matter. This, alone, is a sufficient basis to reverse the *Order* and grant Nexus' confidentiality request.[23]

B. Nexus Will Suffer Substantial Competitive Harm If Its Subscriber Count And De-Enrollment Information Is Disclosed.

By making its erroneous claim that Nexus' subscriber count data is public, the *Order* is able to sidestep the plain fact that Nexus' competitive position will be harmed by public disclosure that information. On that point, however, Commission precedent makes clear that disclosure of a communications provider's market-specific subscriber count information is likely to cause substantial competitive harm and should be withheld from public disclosure.[24] So, once

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[23] In a footnote, the *Order* notes that Nexus publicly filed its Iowa-specific Form 555 with the Iowa Utilities Board. *Order*, WC Docket No. 11-42 at n. 12. That is insufficient to show that Nexus' subscriber information is "publicly available" in a manner that would thwart confidential treatment under FOIA Exemption 4. First, a single filing of a Form 555 in a single state does not ameliorate the competitive injury that would result from the public disclosure of ***all*** of Nexus' Form 555 filings in ***all*** states, nationwide. Second, Nexus sought permission from Iowa regulators to submit its From 555 confidentially, but that permission was not granted. Nexus was, therefore, compelled to publicly file that information. As a result, the Iowa filing is not dispositive of whether the information should be treated as confidential by the Commission. *See Continental Oil Co. v. Federal Power Comm'n*, 519 F.2d 31, 36 (5th Cir. 1975) ("The FPC maintains that the information is not confidential. They point to the fact that at least one state requires public disclosure of data of the type required . . . This proof falls short of carrying the contention that the broad reach of Order No. 521 is harmless to the business interests of those it affects").

[24] *See, e.g., In re News Corp.*, Order on Second Protective Order, 18 FCC Rcd. 15198, 15198-99 (rel. July 22, 2003) (subscriber counts broken down by zip code and DMA are "competitively sensitive"); *In re AT&T, Inc. and BellSouth Corp. Applications for Approval of Transfer of Control*, Order, 21 FCC Rcd. 7282, 7282-83 (rel. July 7, 2006) (a company's "customer data (including revenues associated with the specific customer ***or group of customers***)" is material that, "if released to competitors, would allow those competitors to gain a significant advantage in the marketplace") (emphasis added); *see also In re Request for Confidentiality for Information Submitted on Forms 325 for the Year 2004*, Order, 21 FCC Rcd. 2312, 2314 (rel. March 8, 2006) (confidential treatment warranted for a provider's "number of Internet subscribers . . . telephony subscribers . . .number of fiber optic nodes" and number of subscribers per node reported in FCC Form 325).

the erroneous idea that Nexus' subscriber count information is already public is set aside, it follows that Nexus is entitled to have its Form 555 filings treated as confidential.[25]

This conclusion is even more clear with respect to Nexus' de-enrollment information, as opposed to its total subscriber counts. Even the *Order* does not claim that state-by-state de-enrollment information is publicly available from any other source, because, quite obviously, it is not. With respect to that information, the *Order* states that WCB:

> [was] not persuaded that public inspection of the number of Nexus' subscribers that were de-enrolled for failure to re-certify their service or failure to use such service within 60 days would cause Nexus substantial competitive harm. Nexus offers only a vague assertion that disclosure of de-enrollments will provide valuable information to competitors of which market segments are most responsive to Nexus' outreach efforts.[26]

This conclusion is untenable. Nexus' showing that its competitive position would be compromised by the public disclosure of its de-enrollment information was in no way "vague." After noting the competitive harm arising from disclosure of subscriber count information, Nexus explained that there is:

> an even ***greater*** concern in the case of the state-by-state, month-by-month, category-by-category (non-usage versus non-response) figures for de-enrollment contained in the Form 555. While all Lifeline customers meet basic eligibility requirements set out by the Commission (*e.g.*, participation in the federal Food Stamp program), there are various sub-groups within the overall market segment

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[25] State-specific subscriber counts are the kind of material that the Commission routinely regards as "highly confidential" when issuing protective orders in various proceedings. *See, e.g., In the Matter of Application of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC For Consent To Assign Licenses; Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, LLC For Consent To Assign Licenses*, Second Protective Order, 27 FCC Rcd. 289, WT Docket No. 12-4, DA 12-51 (FCC Wireless Telecomm'n Bur. January 17, 2012) at ¶¶ 2-3 and Appendix A, ¶ 5 (information is presumptively "highly confidential" if it "provides ***numbers of customers*** and revenues broken down by ***customer type*** (*e.g.,* business) and ***market area*** (*e.g.,* CMA/MSA/RSA, DMA, ***state,*** regional cluster) or zip code) (emphasis added). The fact that this type of information is routinely given the highest protection by the Commission in other proceedings should have given the WCB pause before denying Nexus' confidentiality request.

[26] *Order*, WC Docket No. 11-42 at ¶ 6.

> of eligible consumers. The marketing and customer outreach strategies of different Lifeline ETCs focus on different subgroups. Providing state-by-state, month-by-month information about what portion of Nexus' customer base was de-enrolled for non-response and non-usage will provide valuable information to competitors regarding the long-term economic benefits of targeting the market segments that are most responsive to Nexus' marketing and customer outreach efforts.[27]

This explanation fully comports with Commission precedent granting confidential treatment to similar information regarding changes in subscriber counts and subscriber turnover (*e.g.*, churn rates and subscriber service cancellations).[28] As the Commission has explained, the public disclosure of such information "would result in competitive harm by enabling competitors to identify demand for individual types of services, thereby targeting facility construction and service marketing to the detriment of" the provider.[29] In light of this clear precedent, Nexus was not required to spell out, step by step, the specific ways that competitors could use its subscriber counts, churn rates, and reasons for subscriber de-enrollment to harm Nexus in the marketplace. That is, the only way that the WCB could find Nexus' showing to be "vague" in any way was by choosing to ignore Commission precedent on this issue.[30]

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27 *Nexus Supplement* at 2-3 (emphasis added).

28 *See, e.g., In re News Corp.*, Order on Second Protective Order, 18 FCC Rcd. 15198, 15198-99 (rel. July 22, 2003) (subscriber churn-rate information broken down by zip code and DMA are "highly confidential and competitively sensitive information"); *In re AT&T Services, Inc. v. Cox Enterprises, Inc.*, Order, 23 FCC Rcd. 14176, 14177-78 (rel. Oct. 3, 2008) ("AT&T's rate of sales penetration, ***cancellation and 'churn' information*** . . . is so competitively sensitive that additional protection is warranted so that such information is closely guarded and not made available publicly") (emphasis added).

29 *In re John E. Wall, Jr.*, Memorandum Opinion and Order, 22 FCC Rcd. 2561 (rel. Feb. 9, 2007).

30 Given that the WCB did not follow precedent, and claimed to be unable to understand the competitive harm from revealing this information, Nexus provides a more detailed explanation here. Nexus emphasizes, however, that given the Commission precedent noted above, no such explanation was required. This showing constitutes a more detailed explanation of the points made to the WCB, not the presentation of new material on review. *Cf.* 47 C.F.R. § 1.115(c).

The Commission's precedent recognizing that information about subscriber counts, churn, etc. is competitively sensitive certainly applies to Nexus' Form 555s and what the data in those forms can reveal about Nexus' operations. De-enrollment data from Form 555 permits the estimation both of churn rates and the rate at which the filing company is acquiring new subscribers; the evaluation of the merits of the filing company's product offerings; and a determination of the effectiveness of their marketing and customer care strategies.[31] For instance, a comparison of the de-enrollment figures for non-response or ineligibility reported by fourteen of Nexus' competitors in Form 555 shows that, at 44%, Virgin Mobile has the second worst results in ***that*** category,[32] even though Virgin Mobile, at 2%, has the ***best*** results in terms of de-enrollment for non-usage.[33] This suggests that Virgin Mobile may have fewer incidents of non-usage arising from malfunctioning handsets, which may be the result of the superior quality of its equipment (*e.g.,* Virgin Mobile requires that subscribers use Virgin Mobile handsets), or superior warranty and replacement policies.[34] Thus, the comparative data from Form 555, combined with other on-the-ground market knowledge, can be used to provide valuable insight into a firm's operational strengths and weaknesses. Nexus does not want its competitors to be able to perform any similar analysis with respect to Nexus' operations.

In addition to allowing competitors to assess a firm's strengths and weaknesses, Form 555 de-enrollment data also permits ETCs to develop profiles of their competitors' subscribers to identify the demand levels and profitability of certain markets. For example, in general high usage subscribers are preferred to low usage subscribers, because (among other things) they may

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31 Exhibit A at ¶ 14 and Table 3. *See also* Sections IV.C. and IV.D., *infra.*

32 *Id.*

33 *Id.*

34 *Id.*

upgrade their basic plan with additional paid minutes, or add text and data capabilities. Section 4 of Form 555 shows state-specific de-enrollment figures for non-usage and is, therefore, a map for competitors to identify those ETCs with the most "high usage" subscribers; combined with an on-the-ground knowledge of the marketing and other outreach activities of competitors, this de-enrollment data thus provides valuable competitive intelligence.[35] Again, Nexus has no interest in making that kind of information about its own operations available to competitors.

Accordingly, Nexus was correct when it told the WCB that "[p]roviding state-by-state, month-by-month information about what portion of Nexus' subscriber base was de-enrolled for non-response and non-usage will provide valuable information to competitors regarding the long-term economic benefits of targeting the market segments that are most responsive to Nexus' marketing and customer outreach efforts," and under Commission precedent, such information must be treated confidentially. The *Order* ignored that precedent without articulating any specific reasons why it was not "persuaded" by Nexus' arguments.[36] The Commission should, therefore, reverse the *Order* and rule that Nexus' Form 555 filings for data year 2012 must be treated confidentially and withheld from public disclosure pursuant to 47 C.F.R. §§ 0.457 and 0.459, FOIA Exemption 4, and the Trade Secrets Act.

C. What Matters Is Other ETCs' Use Of *Nexus'* Confidential Subscriber Count And De-Enrollment Data, Not Whether Other ETCs Treat *Their* Data As Confidential.

The *Order* posits that the competitive sensitivity of Nexus's subscriber count and de-enrollment information is questionable because other ETCs have chosen to publicly file the same

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35 Exhibit A at ¶ 12.

36 *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books . . . And of course the agency must show that there are good reasons for the new policy").

information.[37] That consideration is legally irrelevant. Whether other ETCs treat their subscriber count and de-enrollment information as confidential is not Nexus' responsibility. Nexus has shown that ***it*** treats ***its*** state subscriber count and de-enrollment information as confidential, including by seeking confidential treatment of that information where federal or state law requires public disclosure.[38] It is undisputed that the market for Lifeline services is competitive. The Commission must, therefore, individually assess whether Nexus is likely to suffer competitive harm by the release of the information, irrespective of whether and how other ETCs choose to protect their business interests.[39] Indeed, the Commission's regulations allowing individual providers to seek confidential treatment of their own information would make no sense if there were no requirement to make case-by-case determinations of competitive harm.

In this regard, Nexus is a smaller and more focused company than its major competitors such as Tracfone and Virgin Mobile. Providing service to Lifeline subscribers is a relatively small portion of the business of those firms, but it is essentially all Nexus does.[40] This makes Nexus much more vulnerable to competitive injury arising from disclosure of confidential data regarding its Lifeline operations than its major competitors might be. Again, Nexus cannot be bound by what its competitors choose to reveal, but it bears emphasis that different firms may make different choices regarding what efforts to put into protecting confidential Lifeline data for

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37 *Order*, WC Docket No. 11-42 at ¶ 6.

38 *Order*, WC Docket No. 11-42 at n. 12 (noting that Nexus complied with the Iowa Utilities Board requirement that its Form 555 for that state be publicly filed because, notwithstanding Nexus' request for confidential treatment, the Iowa Utilities Board "determined that such information is not deemed confidential").

39 *See National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (test is whether the disclosure is likely to cause substantial harm to the competitive position ***of the person from whom the information was obtained***) (emphasis added).

40 In addition, Virgin Mobile operates under the umbrella of a well-known global brand, with name recognition that Nexus has no hope of matching.

the simple reason that the data matters more to some firms than others. The *Order* erred in trying to bind Nexus, with respect to ***its*** confidential data, to choices that other firms may have made about ***their*** confidential data.

This conclusion is also confirmed by the relevant substantive standard. For purposes of determining whether confidential treatment of information is warranted, "competitive injury" justifying confidentiality is injury that flows from the ***use,*** by its competitors, of the ***submitting party's*** commercial or financial information.[41] The question, therefore, was not whether other ETCs generally release the same information; the question was whether ETCs that compete with Nexus would be able to ***use Nexus'*** information to ***their*** competitive advantage. Nexus' request for confidential treatment showed that they could indeed do so. The *Order* contains no contrary findings. As a result, the Commission should reverse the *Order* and instead rule that Nexus' Form 555 filings for data year 2012 must be treated as confidential and withheld from public disclosure, pursuant to 47 C.F.R. §§ 0.457 and 0.459.

D. Confidential Information May Be Mined Using Form 555 As A Starting Point

As explained above, the *Order* erred in claiming that Nexus' subscriber counts can accurately and reliably be deduced from Lifeline disbursement amounts stated on USAC's website. But the *Order* must be reversed even if it were, in fact, possible to easily determine Nexus' subscriber counts. This is because "[e]ven if the information subject to a [request for confidential treatment] would not itself threaten competitive injury, it is properly protected if the [party that would obtain the information] has other, public sources of information that could

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[41] *See, e.g., Gilda Industries, Inc. v. U.S. Customs & Border Protection Bureau,* 457 F.Supp.2d 6, 9 (D.D.C. 2006).

complete the picture of its competitors."[42] In this case, ETC competitors could easily correlate Nexus' subscriber count information with de-enrollment data and other on-the-ground market information to discover a host of information that would help "complete the picture" of Nexus' operations, for the benefit of its competitors.

To illustrate this point, Nexus engaged Drs. Ankum and Denney of QSI consulting,[43] to review publicly reported Form 555 data and outline how that information may, in combination with on-the-ground market information available to industry participants, reveal useful confidential commercial and financial information.[44] For instance, Drs. Ankum and Denney used Tracfone's Form 555 data to show that the customer loss information reported in blocks C through L and Section 4 of the form may be used to estimate an ETC's success in acquiring new subscribers in particular markets.[45] Taking the *Order*'s claim that overall subscriber counts could be publicly derived at face value,[46] Drs. Ankum and Denney use that information in connection with Tracfone's de-enrollment data to conclude that Tracfone was successful at acquiring customers in Ohio during the May 2012 – December 2012 period, even though the subscriber counts taken as a whole indicated a decline.[47] This information can obviously be used to evaluate the effectiveness of a competitor's marketing efforts and the competitiveness of its product offerings.[48] So, even if overall subscriber count data is otherwise public, which it is not,

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42 *Id.* at 12; *see also The Lakin Law Firm,* Memorandum Opinion and Order, 19 FCC Rcd. 12727, 12729-31 (rel. July 8, 2004).

43 Exhibit A at ¶¶ 1-2.

44 *See Nexus Supplement* at 2-3; *see also* Exhibit A at ¶¶ 10-15 and n. 2, 4.

45 Exhibit A at ¶ 11.

46 *Id.* at ¶ 11 and Table 1.

47 *Id.*

48 *Request for Confidential Treatment* at 3; *Nexus Supplement* at 1-3; Exhibit A at ¶ 11.

combining that information with the clearly non-public de-enrollment data allows competitors to derive precisely the type of information that the Commission has treated confidentially.

The same is true with respect to the detailed breakdown of the different ***reasons*** for de-enrollment – non-usage versus non-response. To illustrate this, Drs. Ankum and Denney again used Tracfone's publicly filed data, and compared it to estimates of the overall subscriber counts deduced from information on USAC's website. Even taking into account the estimated nature of the subscriber counts (as discussed above), the overall view shows that Tracfone started losing customers between July and September 2012. But when the month-by-month de-enrollment for non-usage data is removed, the analysis reveals that Tracfone was acquiring new customers between July and September 2012.[49] This suggests that Tracfone engaged in an effective marketing effort during this time. Industry participants aware of the nature of Tracfone's on-the-ground marketing activities can now use that intelligence, combined with the Form 555 data, to assess the effectiveness of Tracfone's marketing. As Drs. Ankum's and Denney's analysis makes clear, however, that assessment is not possible using only a raw subscriber count.[50] De-enrollment data, therefore, should be kept confidential irrespective of subscriber count data. That said, because subscriber count data is not easily derivable from public sources, clearly that data must be kept confidential as well.

In this regard, information other than subscriber counts may be used in conjunction with Form 555 data to uncover competitively sensitive information about Lifeline service providers. Many providers (such as, for example, Budget PrePay and Virgin Mobile), provide information about the handsets used with their services, and policies related to the use and replacement of

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49 *Id.* at ¶ 13 and Table 2.

50 *Id.*

handsets.[51] This information may be used with the non-usage data to evaluate the competitiveness of different providers' handsets, warranties, and policies. As Drs. Ankum and Denney explain, an obvious possible source of non-usage may be malfunctioning handsets. By correlating the non-usage information in Form 555 with the handset equipment, warranty, and replacement information made public by providers, as well as industry knowledge about which handset equipment is being used by which providers, an ETC may evaluate the market effectiveness of competing ETCs' equipment and associated warranty and repair policies.[52]

These examples show how competitors can mine competitively sensitive information from the information contained in Form 555; had Nexus' competitors not disclosed that information, the analyses undertaken by Drs. Ankum and Denney could not have been conducted. Nexus has chosen to keep its Form 555s confidential precisely in order to make it impossible for its competitors to conduct such analyses using ***its*** data.

V. CONCLUSION

For the foregoing reasons, Nexus respectfully requests that the Commission reverse the *Order* denying Nexus' request for confidential treatment of its Form 555 filings for data year 2012 and issue an order determining that Nexus' Form 555 filings must be treated confidentially by the Commission and withheld from public disclosure pursuant to 47 C.F.R. §§ 0.457 and 0.459, FOIA Exemption 4, and the Trade Secrets Act.

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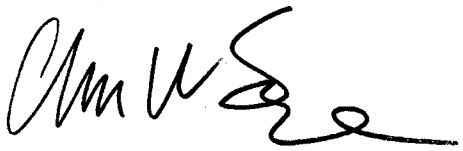
51 *Id.* at ¶ 12.

52 *Id.*

Perhaps Nexus is more cautious about these issues than some of its competitors. But it has good reason to be, considering the advantages of size, scope, and brand awareness that some of those competitors enjoy. In this hotly competitive environment, a relatively small, single-market firm ***has to*** jealously protect whatever competitive advantages it might have.[53] The *Order* clearly erred in concluding that Nexus cannot do so.

Respectfully submitted,

NEXUS COMMUNICATIONS, INC.



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Its Attorneys

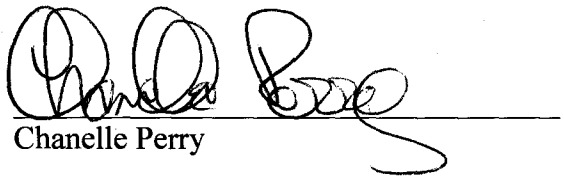
May 13, 2013

[53] From this perspective, iconic Intel CEO Andy Grove said it all in the title of his book: A. Grove, ONLY THE PARANOID SURVIVE: HOW TO EXPLOIT THE CRISIS POINTS THAT CHALLENGE EVERY COMPANY (1996).

CERTIFICATE OF SERVICE

I, Chanelle Perry, a Paralegal in the law firm of Davis Wright Tremaine, LLP, hereby certify that on this 13th day of May, 2013, I caused a copy of the foregoing "**APPLICATION FOR REVIEW**" to be served by hand upon the following:

Julie A. Veach
Chief, Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554



Chanelle Perry

EXHIBIT A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	WC Docket No. 11-42
Request for Confidential Treatment of Nexus Communications, Inc. Filing of FCC Form 555	)	

AFFIDAVIT OF
AUGUST H. ANKUM, PH.D. AND OLESYA DENNEY, PH.D.

We, August Ankum, Ph.D. and Olesya Denney, Ph.D., hereby state the following:

I. INTRODUCTION

A. Qualifications and Purpose

1. My name is August H. Ankum, Ph.D. (Economics) and my business address is 429 North 13th Street, Philadelphia, PA, 19123. I currently serve as Senior Vice President with QSI Consulting, Inc. ("QSI"). QSI is a consulting firm specializing in regulatory and litigation support in regulated network industries, with a special emphasis on telecommunications issues. I have over twenty years of experience working in the telecommunications industry.

2. My name is Olesya Denney, Ph.D. (Economics), and my business address is 2230 Brandon Pl., West Linn, Oregon. I currently serve as a Senior Consultant with QSI. I have over ten years of experience working in the field of telecommunications.

3. This Affidavit was prepared on behalf of Nexus Communications, Inc. ("Nexus"). We have been asked by Nexus to examine whether the information contained in the FCC Form 555 is competitively sensitive and (since we find that it is) to provide

some examples of how this information can be used to disadvantage the entity that reports it. This request was prompted by the Federal Communications Commission ("FCC") April 29, 2013 Order in docket WC 11-42 ("Order") that denied a request filed by Nexus seeking confidential treatment of its FCC Form 555 filing with the FCC and the Universal Service Administrative Company ("USAC") for data year 2012 ("Form 555 data").

B. Summary

4. Access to Form 555 de-enrollment data can be used by knowledgeable industry participants to ascertain competitively sensitive information about the company making the filing; for example, it allows an industry participant to estimate competitors' churn and new acquisitions, pinpoint their weaknesses, and evaluate the merits of various product offerings, marketing and customer care strategies. Importantly, because there are significant variations across companies' churn, rates of customer acquisitions, product offerings, marketing strategies, etc., an industry participant can readily correlate the Form 555 information to the specifics of the filing company's operations, thus revealing the successes and failures of certain marketing strategies, use of equipment (handsets), pricing strategies, etc. While the information reported in Form 555 may not necessarily be sufficient in and of itself to support a formal quantitative analysis of a competitor's strengths and weaknesses, it is obvious that the information can be used by industry participants, with detailed knowledge of the industry and competitive activities, to derive competitively sensitive information on, and insights into, the activities of other market participants.

It is therefore entirely reasonable for a company to guard this information and keep it from competitors.

II. ANALYSIS

5. Form 555 contains five general types of subscriber counts: (1) Total Subscribers (Block A); (2) Results of Eligible Telecommunications Carrier's ("ETC") Re-certification through Direct Contact (Blocks C through G); (3) Subscribers De-Enrolled Prior to Re-certification (Blocks H and L); (4) Results of Re-certification through State Administrator or ETC Access to Eligibility Data (Blocks I through K), and (5) Subscribers De-enrolled for Non-Usage (Section 4). For simplicity, when discussing the data contained in these blocks, we omit reference to Form 555, and instead refer to these data simply as "Block A" or "Section 4" data.

6. The Order claimed that Total Subscriber Counts (Block A) can be derived from the already publicly available data on Lifeline disbursements. This is not true. The following complicating factors eliminate the existence of a simple functional relationship between subscriber counts and reported disbursements. First, historical disbursements do not necessarily reflect actual subscriber counts because of subsequent future revisions and true ups: An ETC may discover an error in the subscriber counts after it already filed its initial claim for disbursements (Form 497). The company has up to twelve months from the data month to which the claim applied to correct this error by filing revisions to its originally claimed amounts.[1] As an example, an ETC may have discovered in September 2012 that it under-reported

[1] See instructions to Form 497 at http://www.usac.org/li/tools/forms.aspx.

its May 2012 subscribers on Form 497. It may choose to file the revisions by May 2013. The actual disbursements associated with this revision would take place with a certain lag – perhaps, in June 2013. In other words, until mid-2013 the public does not have the "final" version of disbursement data – data necessary to accurately calculate subscriber counts in May 2012. Yet, Form 555 discloses these data on January 31, 2013. Another situation in which a link between subscribership and disbursement is broken is a disbursement adjustment following an audit: Assume that an audit showed that an ETC was overpaid in some state for prior years – causing a need for a "negative" true up. If the ongoing monthly disbursements in this state are relatively small, the true up may be spread across other jurisdictions in order for USAC to recover the original over-payment.

7. Second, the actual disbursements made by USAC in a given month are affected not only by subscriber counts, but also by the per unit payments, which are not always apparent to the public. At least for the May 2012 data at issue in this specific case, the generally applicable rate of $9.25/subscriber/month was in the process of being phased in, so there was no uniform rate across all companies and states. It is difficult, and would require highly specialized research (if possible at all) to establish when each ETC shifted to the new $9.25 rate. More generally, for ETCs serving a mix of non-Tribal and Tribal customers, different per-subscriber amounts apply to different

classes of customers, eliminating any direct relationship between disbursements and simple subscriber counts.[2] So the Order is simply factually wrong on this point.

8. In addition, even if one could carefully cull data about Tribal lands, past adjustments, etc., to develop a set of reasonable assumptions to apply to a competitor's disbursements to estimate overall subscriber counts, it is clear that the Order erred in suggesting (at ¶6) that this can be done "easily." Putting aside the complicating factors discussed above, to derive the Total Subscriber Counts appearing in Block A from the disbursement data, the public would need to download and sort out the disbursement data for multiple months to identify all payments applicable to Total Subscriber Counts in a specific month such as May 2012. For example, for its May 2012 subscribers in Iowa, Tracfone Wireless Inc. ("Tracfone") received Lifeline disbursements in three installments: in May 2012 (Projection Override), June 2012 (True-up) and January 2013 (True-up).[3] It is far worse from a competitive perspective to simply state a firm's subscriber counts, than to have a situation in which a competitor must undertake a detailed, in-depth effort to derive a possible estimate of those counts. The difficulty of the process (including the investment of time and specialized knowledge required), as well as the uncertainty introduced into the results by having to make assumptions about various matters, is itself a form of protection against competitors obtaining and making use of the subscriber count data.

[2] Consider as an example a hypothetical $10/month rate for non-Tribal subscribers and a corresponding hypothetical $20/month for Tribal subscribers. In that scenario, a disbursement of $40,000 could reflect 4,000 non-Tribal subscribers and no Tribal subscribers; 2,000 Tribal subscribers and no non-Tribal subscribers; or any number of intermediate variations on Tribal versus non-Tribal subscriber counts.

[3] See http://www.usac.org/li/tools/disbursements/default.aspx.

9. Putting aside total subscriber counts, the four other types of subscriber counts (Blocks C through L and Section 4 data) are not publicly available from sources other than Form 555 at all.

10. Even if a firm could determine a competitor's total number of subscribers, total subscriber counts would not fully capture ongoing changes in the firm's customer base. For example, stable subscriber counts may be a result of two completely different underlying business realities: (a) Company 1 – Low Churn: This company would have stable customer base (the same customers stay with the company month after month, and that the company is not acquiring new customers); (b) Company 2 – High Churn: This company would have a dynamic customer base (the majority of customers leave after one month but the same number of customers is being acquired). In the first case the customer churn is very low; in the second case it is very high. Low churn (customer turnover) is generally desirable because it keeps administrative and customer acquisition cost low. Acquisition of new customers is also desirable as it generally increases overall revenues, and presumably profits. The Form 555 information showing the "ins" and "outs" behind competitors' subscriber counts allows one to more accurately assess the nature of a company's business model and the effectiveness of its strategies. For example, if Company 2 (the High Churn company) knows that Company 1 has low churn, it may study and mimic some of Company 1's business strategies to lower its own unfavorable churn. Similarly, if Company 1 is aware of Company 2's success in acquiring new customers, it may study and mimic Company 1's marketing strategies to promote customer growth. Without question, this aspect of the Form 555 information allows an informed

industry participant to put competitors' total subscriber counts into a competitively sensitive perspective.

11. Blocks C through L and Section 4 provide information on total customer losses. This information allows the estimation of customer acquisitions by combining the customer loss data with the total subscriber counts. This concept is illustrated in the following Table 1, which uses Tracfone's data for Iowa as an example.[4] The first three data lines of this table contain subscriber counts: For May 2012, subscriber counts are taken directly from Form 555. For December 2012 they were estimated from publicly available Lifeline disbursement data (noting, as discussed above, that this is not actually an exact process). Lines four through six contain information on customer losses taken from in Form 555. The last line combines information from the two sources to produce an estimate of the new customer acquisitions.

[4] Note that all examples in this affidavit are based on the data of ETCs other than Nexus', because their Form 555 data are available publicly. While our example uses Tracfone's data, our broader point is that anyone can "mine" company Form 555 data (including Nexus' data) to extract information that is competitively sensitive.

Table 1.

Derivation of New Customer Counts from Form 555 and Lifeline Disbursement Data: An Example Using Data for Tracfone Wireless - Iowa

Line	Measure	Source	Count
L1	Subscriber Count, May-12	Form 555 Block A	17,295
L2	Subscriber Count, Dec-12	Derived from disbursement data	14,789
L3 = L2-L1	Net Change in Subscribers May to Dec.		-2,506
L4	De-Enrolled prior to Re-Certification	Form 555 Blocks H + L	2,916
L5	De-Enrolled Due to Non-Response or Ineligibility	Form 555 Blocks G + K	2,877
L6=L4+L5	Total De-Enrolled		5,793
L7=L3+L6	**Estimate of New Customer Acquisitions**		**3,287**

As shown in Table 1, the total subscriber counts indicate that between May and December 2012, Tracfone experienced net subscriber losses of 2,506 customers. Form 555 shows that there were a total of 5,793 customers lost. It follows that over that same period, approximately 3,297 new customers were added.[5] The information on Tracfone's customer acquisitions can now be used to evaluate the effectiveness of Tracfone's marketing efforts and the competitiveness of its product offerings – factors about which industry participants will be well-informed. Moreover, this ability to mine useful competitive intelligence by combining Form 555 data with pre-existing market knowledge is enhanced when the analysis is performed for multiple companies, not just one. This is precisely why companies typically keep this type of information private.

[5] Here for simplicity we are assuming that de-enrollment due to non-response or ineligibility has happened by December 2012. We recognize that in reality some customers may have been scheduled for de-enrollment but not actually de-enrolled by that date.

12. Section 4, which contains data showing de-enrollment for non-usage, allows for additional insight into a company's operations and strategies. For example, non-usage can arise from the customer not using telephone service often. This type of customer is less desirable than are customers with higher demand for telephone services (for example, such customers may be more likely to upgrade their basic subsidized plan with additional minutes, text and data capabilities). Alternatively, the non-usage can be caused by poorly designed or malfunctioning handsets. Pre-paid low income ETCs typically provide a "free" (often re-furbished) handset with a warranty that can be as short as one month,[6] or as long as one year.[7] If the handset malfunctions beyond the warranty period, the user may need to get a new handset at his or her expense (which may not be economically feasible), or may obtain a new "free" handset by switching to another company. Information on a company's handsets is not reported in Form 555, but industry participants know what types of handsets are being used by which competitors. They can then match this knowledge with the Form 555 information to come to competitive conclusions they could not otherwise reach.

13. Further competitively sensitive information can be obtained by isolating de-enrollment for non-usage from the set of factors affecting subscribership in order to see the impact of new customer acquisition efforts. Because non-usage reported on Form 555 is broken out on a monthly basis, its combination with monthly subscriber counts would allow for a granular analysis of month-to-month dynamics of customer outflows and inflows. This is shown in Table 2, which again is based on data for

[6] Budget PrePay Lifeline offering (https://www.budgetmobile.com/questions/).

[7] Virgin Mobile Assurance Wireless offering (http://www.assurancewireless.com/Public/FAQs.aspx).

Tracfone in Iowa. This table combines monthly subscriber counts with Section 4 data:

Table 2.

Change in Subscriber Counts Net of De-Enrollement for Non-Usage
An Example Using Data for Tracfone Wireless - Iowa

Month	Subscriber Count	Net Change in Subscribers from Previous Month	De-Enrolled for Non-Usage	Change in Subscribers if Exclude De-Enrolled due to Non-Usage
(a)	(b)	(c) calculated from (b)	(d) Form 555 Sec. 4	(e) = (c) + (d)
Jan-12	11,380		32	
Feb-12	12,757	1,377	91	1,468
Mar-12	13,477	720	119	839
Apr-12	14,312	835	200	1,035
May-12	17,295	2,983	336	3,319
Jun-12	17,796	501	279	780
Jul-12	17,577	-219	913	694
Aug-12	17,220	-357	621	264
Sep-12	16,567	-653	759	106
Oct-12	15,806	-761	590	-171
Nov-12	15,265	-541	525	-16
Dec-12	14,789	-476	325	-151
Total		**3,409**	**4,790**	**8,199**

As shown in Table 2, column (c), Tracfone has been losing Iowa subscribers starting in July 2012. De-enrollment for non-usage (column (d)) was a significant factor to this loss. However, if de-enrollment for non-usage is taken out of the equation (column (e)), it turns out that the dynamics of Tracfone's remaining subscribership actually *improves*. Specifically, the time period between July and September 2012 now exhibits a *gain* in customers, not a loss. Assume hypothetically that in July 2012

Tracfone was trying out a new marketing instrument such as direct mail advertisement. An examination of "raw" subscribership data (column (b)) would suggest that the new marketing did not work because the overall subscribership was declining in the three months following the trial. However, when de-enrollment for non-usage is isolated from total subscriber counts, the result is a modest upward movement in subscribership. To summarize this example, Form 555 data, combined with on-the-ground knowledge of what the filing company was doing in the marketplace (knowledge that competitors would have) would allow competitors to gain competitive insights into the hypothetical marketing effort that Tracfone undertook at its own risk and expense, but without the need for the competitors to engage in the same trial. As a result, the company undertaking innovative trials is put at competitive disadvantage because the competitively sensitive results of its efforts are in effect made public in its Form 555. The long-term outcome is that the public disclosure of Form 555 data would discourage experimentation and innovations in the industry.

14. More generally, by categorizing customer outflows, Form 555 allows one to estimate competitors' churn and new acquisitions, pinpoint their weaknesses, evaluate the merits of various product offerings, marketing and customer care strategies. This information is particularly useful because the data on churn, and rates of customer acquisitions vary across companies. Similarly, product offerings, marketing strategies, handset policies, and etc., vary across companies, so that the observed Form 555 metrics can be correlated with the specifics of each ETC's operations. This is shown in Table 3, which pools Form 555 data of major pre-paid wireless ETC

(Nexus' principal competitors).[8] This table presents various types of customer outflows (de-enrollment) as percentages of total subscribership (which permits comparisons between companies). The three bottom rows contain the average,[9] minimum and maximum values. For these percent ("rates") metrics, bold font indicates "better than average" values.

[8] Based on Form 555 filings available from the FCC. Each ETC-row is based on the summation of state level Form 555 data.

[9] Straight average for all percent metrics except for column (c), which is a weighted average.

Table 3.

Customer Loss by Reason: Comparison of Major Pre-Paid Eligible Telecommunications Carriers
(Derived from Form 555 for data year 2012 submissions)

ETC	Number of Subscribers Claimed on the May FCC Form 497	% De-Enrolled as a Result of Non-Response or Ineligibility	% De-Enrolled for Non-Usage (Average of Jun-Dec)	% De-Enrolled Prior to Re-certification Attempt	% Responded to ETC Contact
(a)	(b)	(c)	(d)	(e)	(f)
Form 555 Block Source:	A	(G + K) / A	Section 4 Average / A	(H + L) / A	D / C
Tracfone Wireless	3,958,811	**18%**	**3%**	**21%**	**82%**
Virgin Mobile USA	3,687,756	44%	**0.02%**	**22%**	**60%**
Telrite Corporation	648,787	**20%**	9%	159%	**62%**
Budget PrePay	504,279	**21%**	**4%**	**36%**	**63%**
Yourtel America	338,346	**22%**	**5%**	**56%**	44%
TAG Mobile	310,500	33%	8%	99%	17%
Terracom	241,668	**24%**	**6%**	**50%**	**48%**
Assist Wireless	191,780	28%	**5%**	101%	27%
Global Connections	172,701	**24%**	11%	97%	**54%**
Affordable Phone	160,023	36%	10%	120%	9%
Cintex Wireless	153,330	**25%**	7%	94%	44%
Smith Bagley	72,170	**15%**	**1%**	**36%**	**86%**
DPI Teleconnect	53,599	**21%**	9%	136%	33%
Easy Telephone	53,247	53%	12%	**59%**	25%
Total	10,546,997	29%	6%	77%	47%
Minimum		15%	0.02%	21%	9%
Maximum		53%	12%	159%	86%

As shown in Table 3, rates of de-enrollment vary significantly by company. For example, in terms of de-enrollment as a result of non-response or ineligibility (column (b)), Virgin Mobile (at 44%) is the company with the second worst results. However, in terms of de-enrollment for non-usage (column (d)), Virgin Mobile had by far the best results (at 0.02%). One possible explanation for the very low de-enrollment for non-usage is that Virgin Mobile has a lower incidence of non-working

handsets compared to other companies. As mentioned above, Virgin Mobile offers a one-year warranty on its handsets, while some other companies offer only a one-month warranty. At the same time, Virgin Mobile allows subscribers to use only Virgin Mobile phones. In contrast, some other companies, such as Telrite,[10] allow subscribers to use subscriber-owned unlocked phones, which may increase the likelihood of phone problems. As shown in Table 3, consistent with this possibility, Telrite has above average rates of de-enrollment for non-usage. While the cause of the variation may not be apparent to a casual observer, it most surely will be evident to active industry participants that are familiar with the particulars of the different handsets, etc. Again, the Form 555 information allows them to connect the dots and reach competitively sensitive conclusions.

15. The data on response rate to ETC contact (column (f) of Table 3) is yet another metric that permits one to evaluate the relative effectiveness of different business models, and potentially ascertain differences between various geographic markets. For example, customers may not have responded to the ETC contact because they were no longer eligible for service, or simply because they did not pay attention to ETC's communication or did not understand the urgency of the required response. A comparison of the response rates to ETC contact across companies allow companies to evaluate their methods and less successful companies to adopt those of from more successful ones. As seen in this table, the two companies with the highest response rates are Smith Bagley at 86% (driven largely by the response rates of its tribal customers), and Tracfone at 82%. The Smith Bagley experience may also draw other

[10] See http://www.lifewireless.com/.

ETCs' attention of the Tribal land markets because high response rates in these markets make it easier to retain customers. Again, Form 555 discloses competitive sensitive information.

16. To summarize, Form 555, especially when combined with other data that competitors will have, allows one to estimate a reporting company's inflows and outflows of customers and break down its outflows into specific causes. These customer movements provide indications of the company relative weaknesses and strengths, which is competitively sensitive information not otherwise available. The Order's factual conclusion that the information in and obtainable from a Form 555 is not confidential and/or is not competitively sensitive is simply erroneous.

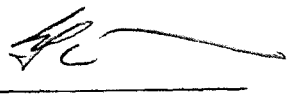
I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 13, 2013.

August Ankum, Ph.D.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 13, 2013.



Olesya Denney, Ph.D.